IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, et al., *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	Case No. 20-1115 (proposed consolidation with 15-1239)

MOTION TO CONFIRM VENUE, CONSOLIDATE, AND HOLD IN ABEYANCE

Petitioners challenge EPA's reversal of portions of a 2015 nationwide rule prohibiting Clean Air Act state implementation plans ("SIPs") from including affirmative defenses to penalties for violations during periods of startup, shutdown, and malfunction ("SSM").[1] EPA's 2015 rule was based in relevant part on this Court's decision in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055,

[1] *See State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33,840 (June 12, 2015) ("SIP Call"), and *Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision—Affirmative Defense Provisions*, 85 Fed. Reg. 7,232 (Feb. 7, 2020) ("Withdrawal Rule").

1063 (D.C. Cir. 2014) ("*NRDC*"), which held that the Clean Air Act mandates federal district courts—not agencies—determine appropriate penalties in an enforcement case. EPA's 2015 rule (the "SIP Call") required 17 states—including Texas—to remove affirmative defenses from their state plans. Multiple challenges to the SIP Call have been consolidated, fully briefed, and remain pending before this Court. *See Envtl. Comm. of the Fla. Elec. Power Coordinating Grp. v. EPA*, Case No. 15-1239 (and consolidated cases).

After the 2017 change in administrations, the Court stayed the litigation to allow EPA to reconsider the SIP Call. In its periodic status reports to the Court, EPA claims that it is continuing its review of that rule. At the same time, however, EPA has—through the new rule at issue in this case—withdrawn the SIP Call for Texas and concluded that the previously-unlawful Texas affirmative defense provisions are now "an example of" a permissible affirmative defense. 85 Fed. Reg. at 7,237. And, separately, EPA has recently finalized a rule withdrawing the SIP Call for North Carolina, allowing exemptions that the 2015 rule previously prohibited.[2] Thus, though EPA claims it is continuing to review the rule, EPA is reversing the national SIP Call through purportedly state-specific actions.

[2] EPA Status Report, No. 15-1239 (D.C. Cir. Apr. 3, 2020), ECF No. 1836812 (citing *SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes*, Prepublication Notice (Apr. 2, 2020), *available at* https://www.epa.gov/sites/production/files/2020-04/documents/nc-198-ssm-frn_1.pdf.

EPA asserts that any legal challenges to its new affirmative defense rule must be heard in the Fifth Circuit. 85 Fed. Reg. at 7,242. This Court should, however, reject EPA's attempt to evade review in the D.C. Circuit and dismantle the nationally applicable SIP Call on a piecemeal basis. EPA's approach would override Congress' intent that this Court "review all final EPA actions of nationwide consequence," so as "to prevent a patchwork of regional interpretations of nationally applicable agency actions." *Sierra Club v. EPA*, No. 18-1167, slip op. at 17 (D.C. Cir. Apr. 7, 2020) (Wilkins, J., concurring). *See also Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring) (noting the Clean Air Act's "clear Congressional mandate" for "uniform judicial review of regulatory issues of national importance"). To conserve judicial resources and avoid piecemeal review and potentially conflicting decisions regarding the SIP Call and the underlying Clean Air Act provisions in this Court or elsewhere, Petitioners request that the Court confirm the D.C. Circuit is the proper venue for the present case, consolidate the case with the existing SIP Call cases, and continue to hold the consolidated cases in abeyance until EPA formally decides how to proceed with the SIP Call as a whole.

BACKGROUND

I. EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, AND MALFUNCTION EVENTS HARM VULNERABLE COMMUNITIES.

Sulfur dioxide, particulate matter, and other pollutants released during startup, shutdown, and malfunction events from industrial facilities such as refineries and power plants are a major threat to public health.[3] Even short periods of exposure to pollutants such as sulfur dioxide and particulate matter can have significant health impacts, including impaired lung function, aggravation of asthma, and respiratory and cardiovascular disease.[4] As detailed in the attached declarations, these events at industrial facilities can create very high concentrations of pollution, severely and disproportionately impacting vulnerable downwind communities.[5]

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[3] Researchers at Indiana University, Bloomington have calculated annual health damage resulting from particulate matter released during emission events in Texas to be nearly $150 million, with broader annual public health damages resulting from emission events to be in excess of $250 million. *See* EPA Docket No. EPA-R06-OAR-2018-0770-0035, Exs. C, D, and E; *see also* 80 Fed. Reg. at 33,850 (2015 SIP Call recognizing health impacts of excess emissions during SSM events).

[4] *E.g.,* 75 Fed. Reg. 35,520 (June 22, 1010) (establishing 1 hour standard for sulfur dioxide).

[5] Petitioners have standing to challenge EPA's Withdrawal Rule. Petitioners' members live, work, and breathe air near facilities that emit excess air pollution during startup, shutdown, and malfunction events and are harmed by Texas' affirmative defense provisions, which allow facilities to exceed pollution limits without the imposition of penalties. These harms are traceable to EPA's unlawful withdrawal of the SIP Call for Texas. The harms would be redressed by an order vacating the Withdrawal Rule. *See* attached declarations. That is sufficient to

II. AFFIRMATIVE DEFENSE PROVISIONS IMPERMISSIBLY SHIELD POLLUTERS FROM PENALTIES FOR CLEAN AIR ACT VIOLATIONS.

Subject to EPA approval, states are responsible for developing plans that include enforceable, source-specific emission limits and air quality rules necessary for compliance with the national ambient air quality standards and other Clean Air Act requirements. 42 U.S.C. § 7410(a)(1)-(2).

For many years, EPA approved state plan provisions exempting or limiting liability for violations of pollution limits during facilities' startup, shutdown, or self-diagnosed malfunction events. Seventeen states, including Texas, allow facilities to use an affirmative defense as a shield against penalties for Clean Air Act violations during such events. 80 Fed. Reg. at 33,847 n.13, 33,968-69. Other states, like North Carolina, entirely excuse excess emissions during these periods. *Id.* at 33,964.

Agency-created affirmative defenses and automatic exemptions are flatly unlawful. In *Sierra Club v. EPA,* 551 F.3d 1019, 1027-28 (D.C. Cir. 2008), this Court struck down an EPA-created exemption for pollution exceedances during startup, shutdown, and malfunction events because it was inconsistent with the Clean Air Act's requirement that emission standards apply continuously, 42 U.S.C. § 7602(k). EPA then replaced this exemption with an affirmative defense to

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demonstrate Article III standing. *See Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992).

penalties during such events, which this Court similarly vacated in *NRDC*, 749 F.3d at 1062-64. The Court explained the Act's "citizen suit" provision, 42 U.S.C. § 7604(a), "creates a private right of action" and, "as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines 'the scope'—*including the available remedies*—'of judicial power vested by' statutes establishing private rights of action.'" *Id.* at 1063 (emphasis in original; quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)).

Prior to this Court's decision in *NRDC*, the Fifth Circuit, in 2013, upheld EPA's approval of the Texas affirmative defense SIP provision. *Luminant Generation Co. v. EPA*, 714 F.3d 841, 856-57, 860 (5th Cir. 2013) ("*Luminant*"). The Fifth Circuit determined under *Chevron* "step 2" that EPA's approval was entitled to deference. *Luminant* did not address whether the affirmative defense was unlawful under the Act's citizen suit provision at *Chevron* "step 1." Nor did it address how EPA could reasonably approve a flatly unlawful state plan provision. *Luminant*, 714 F.3d at 853, 856-57 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)).

III. EPA'S NATIONAL SSM SIP CALL AND THE RESULTING LEGAL CHALLENGES.

This Court's *NRDC* decision prompted EPA to reevaluate the legal basis for its previous approvals of affirmative defense provisions, including its approval of the Texas affirmative defense at issue in *Luminant*. 80 Fed. Reg. at 33,958-59.

After carefully analyzing the Court's rationale in *NRDC* and inviting public comment, EPA established a nationwide policy that state-created affirmative defenses for startup, shutdown, and malfunction periods, including the Texas provisions at issue in *Luminant*, were not consistent with the requirements of the Clean Air Act. *Id.* Along with that nationally applicable interpretation, EPA issued a "SIP call" requiring 17 states, including Texas, to correct unlawful affirmative defenses in their plans. 80 Fed. Reg. at 33,847-48. In the SIP Call, EPA also asked 17 states, including North Carolina, to correct loopholes that automatically excuse Clean Air Act violations or give state officials discretion to rubber-stamp permit violations and preclude citizen enforcement. *Id.* at 33,847.

Multiple petitioners challenged the SIP Call in the D.C. Circuit, and this Court consolidated all such challenges under *Southeastern Legal Found., Inc. v. EPA*, Case No. 15-1166.[6] Several Texas petitioners,[7] however, challenged the SIP Call in the Fifth Circuit based on the purportedly "unique" issues raised by *Luminant*—*i.e.,* the Fifth Circuit's decision upholding EPA's previous approval of

[6] The consolidated petitions are: Case Nos. 15-1239, 15-1243, 15-1256, 15-1265, 15-1266, 15-1267, 15-1268, 15-1270, 15-1271, 15-1272, 15-1300, 15-1301, 15-1302, 15-1308. Petitioners Southeastern Legal Foundation, Inc., and Walter Coke, Inc., voluntarily dismissed their appeals, Case Nos. 15-1166 and 15-1216. Many of the environmental-organization Petitioners in the present case intervened on behalf of EPA to defend the SIP Call. *See* Order Granting Envtl. Movants Mot. to Intervene, No. 15-1166 (D.C. Cir. Oct. 27, 2015), ECF No. 1580232.

[7] These petitioners included Luminant Generation Company, LLC and related companies, the State of Texas, and the Texas Commission on Environmental Quality.

the Texas affirmative defense. *See* Texas Resp. to EPA Mot. to Dismiss at 5, *Luminant Generation Co. v. EPA*, No. 15-60424 (5th Cir. July 30, 2015), ECF No. 00513136256. In response, EPA argued—and the Fifth Circuit agreed—that, under 42 U.S.C. § 7607(b)(1), the SIP Call was both "nationally applicable" and "based on" a nationwide interpretation of the Clean Air Act, and should therefore be consolidated for review in this Court with all of the other challenges to the national rulemaking.[8] EPA further argued that Texas' "purportedly unique issues," which related "solely" to the purported preclusive effect of the Fifth Circuit's decision in *Luminant*, "are in fact the same or closely related to issues that will be raised by many or most of the other petitioners challenging the SSM Action." EPA Resp. in Opp. to Mot. to Sever at 7, No. 15-1166 (D.C. Cir. Oct. 1, 2015), ECF No. 1576172. All of the legal challenges to the SIP Call, including the Texas-based petitions, were subsequently consolidated in this Court, where they were fully briefed.

After the change in administration, however, and just 14 days before the May 8, 2017 oral argument, EPA abruptly requested that the Court stay all proceedings to allow it to reconsider the rule. EPA Mot. to Continue Oral Argument, No. 15-1166 (D.C. Cir. Apr. 18, 2017), ECF No. 1671681. The case has

[8] *See* Order Transferring Case, No. 15-60424 (5th Cir. Aug. 28, 2015), ECF No. 00513174477; EPA Mot. to Dismiss at 18-19, No. 15-60424 (5th Cir. July 17, 2015), ECF No. 00513120190.

now been stayed for almost three years. EPA is required to file status reports "on the agency's review of the SSM Action at 90-day intervals." Order, No. 15-1166 (D.C. Cir. Apr. 24, 2017), ECF No. 1672430. In its most recent status report, EPA stated that it was "continuing its review" of the SIP Call. *See* No. 15-1239 (D.C. Cir. Apr. 3, 2020), ECF No. 1836812.

On April 9, 2020, each of the Texas-based petitioners filed substantially-identical motions to voluntarily dismiss their petitions for review. *See* Mots. for Voluntary Dismissal, No. 15-1239 (D.C. Cir.), ECF Nos. 1837519, 1837533, 1837536, 1837557. Nevertheless, other industry and state petitioners' challenges to the SIP Call's policy that affirmative defenses are unlawful remain pending in this Court. *See* No. 15-1166, State Pet'rs Br. at 34-37 (D.C. Cir. Oct. 31, 2016), ECF No. 1643502; *id.*, Industry Pet'rs Br. at 52-60, ECF No. 1643571.

IV. EPA'S PIECEMEAL DISMANTLING OF THE SIP CALL: THE TEXAS AND NORTH CAROLINA ACTIONS.

Two years after the challenges to the SIP Call were stayed, EPA finalized the withdrawal of the SIP Call for Texas on February 7, 2020. 85 Fed. Reg. 7,232. Before issuing the Withdrawal Rule, EPA Region 6 "sought and received EPA headquarters concurrence to deviate from the national policy announced" in the SIP Call. *Id.* at 7,240. Although EPA asserted that it was not announcing a policy that would apply outside of Texas, EPA elsewhere specifically stated that, based on an "alternative interpretation" of the Clean Air Act's requirements, the Texas

affirmative defenses "are an example of how a limited affirmative defense can be properly crafted to be a part of an approved SIP." *Compare id.* at 7,242, *with id.* at 7,240; *see also id.* at 7,238 ("Region 6 thinks it is reasonable for states to include—and the EPA to approve—certain defenses to penalties for violations of [SIP] limits …").

Even though the new final rule revised the national SIP Call, EPA asserted that venue for any challenge to the new rule was not proper in this Court. *See id.* at 7,240-41. And although Petitioners submitted comments that EPA must make a finding under 42 U.S.C. § 7607(b)(1) that the new rule is "based on a determination of nationwide scope or effect" (which would make review proper only in this Circuit), EPA refused to so. 85 Fed. Reg. at 7,241.

EPA finalized the rollback of the SIP call to North Carolina on April 2, 2020.[9] As with EPA's Withdrawal Rule for Texas, the agency's North Carolina rollback similarly "deviate[s]" from the agency's categorical prohibition against automatic exemptions and "adopt[s] an alternative policy" that such exemptions may be "permissible" under the Act.[10]

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[9] EPA Status Report, No. 15-1239, ECF No. 1836812 (citing *SIP Call Withdrawal and Air Plan Approval; NC: Large Internal Combustion Engines NOx Rule Changes*, Prepublication Notice (Apr. 2, 2020), *available at* https://www.epa.gov/sites/production/files/2020-04/documents/nc-198-ssm-frn_1.pdf.

[10] *See id.*, Prepublication Notice at 1, 45, 79, 90.

ARGUMENT

This Court should consolidate this petition for review with the pending SIP Call cases and hold them in abeyance pending EPA's decision regarding reconsideration of the SIP Call. The cases involve identical, purely legal issues related to the interpretation of the Clean Air Act's requirements, and separate adjudication of the issues in this Court and the Fifth Circuit is likely to result in inefficiency and inconsistent judicial interpretations. Because the Withdrawal Rule reverses portions of EPA's national affirmative defense policy, it is necessarily national in scope and properly before this Court.

I. EPA'S REVERSAL OF ITS AFFIRMATIVE DEFENSE PROHIBITION IS PROPERLY BEFORE THIS COURT.

Under the Clean Air Act, this Court is the appropriate venue for review of "nationally applicable regulations," and otherwise regional or local actions "based on a determination of nationwide scope or effect" where EPA has made and published a finding that the action is based on such a determination. 42 U.S.C. § 7607(b)(1). This Court and other circuits have recognized that Congress' intent in enacting § 7607(b)(1)'s venue language was to ensure uniformity for nationally significant issues. *See, e.g., Tex. Mun. Power Agency v. EPA,* 89 F.3d 858, 867 (D.C. Cir. 1996) (the "apparent congressional purpose [in enacting § 7607(b)] was to place nationally significant decisions in the D.C. Circuit"); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017) (noting Clean Air Act's "obvious aim of

centralizing judicial review of national rules in the D.C. Circuit"); *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011) (the Clean Air Act "evinces a clear congressional intent" to centralize review in the D.C. Circuit of "matters on which national uniformity is desirable").

Although EPA's Withdrawal Rule ostensibly applies only to Texas, it is nationally applicable and therefore properly before this Court. On its face, the new rule revises a national rule—EPA's 2015 national SIP Call and underlying affirmative defense policy—by making it inapplicable in a state where it previously applied.

Further, EPA's reversal of its categorical prohibition against affirmative defenses is just as applicable to *other* states as it is to Texas. Indeed, EPA itself describes the Texas affirmative defense provisions as an "example of" "properly crafted" and approvable state plan provisions, 85 Fed. Reg. at 7,237-38—making clear that the agency now views these affirmative defenses as approvable in all states even though the national SIP Call makes clear that they are not even lawful, let alone approvable, in any state. That EPA headquarters and its Office of Air and Radiation each signed off on the rule, describing it as a "reasonable" basis for approving affirmative defenses into state plans, confirms that the new rule marks a reversal of the national rule's prohibition on unlawful affirmative defenses. *Id.* at 7,240.

Even if the rule's interpretation is confined to EPA Region 6, centralized review in this Court is proper. EPA Region 6 has made entirely plain that it views affirmative defenses as lawful. Regardless of EPA's intent to limit the Withdrawal Rule to Texas, the Rule contains no limiting principle that distinguishes Texas from other Region 6 states. Because these states—Arkansas, Louisiana, New Mexico, Oklahoma, and Texas—lie in the U.S. Courts of Appeals for the Fifth, Eighth, and Tenth Circuits, the action is neither "locally" nor "regionally" applicable in the sense meant by 42 U.S.C. § 7607(b)(1) because there is no single Circuit in which review of this interpretation of the Clean Air Act is "appropriate." *See S. Ill. Power Coop.*, 863 F.3d at 674 ("Overlapping, piecemeal, multicircuit review of a single, nationally applicable EPA rule is potentially destabilizing to the coherent and consistent interpretation and application of the Clean Air Act.").

Courts routinely transfer challenges to SIP call actions to the D.C. Circuit when they involve the application of a standard to every state. *See e.g.*, *W. Va. Chamber of Commerce v. Browner,* No. 98-1013, 1998 WL 827315, at *5-7 (4th Cir. Dec. 1, 1998); *Texas*, 2011 WL 710598, at *3. Although EPA's reversal purports to apply only to a single state, the rule amends a national SIP call and announces an alternative interpretation of the Clean Air Act that allows approval of properly crafted SSM affirmative defense provisions modeled after the Texas example. Just as a litigant may not "transform[] a national standard to a regional or

local rule" simply by narrowly focusing on one affected state, *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1198 (10th Cir. 2011), this Court should reject EPA's attempt to transform the revision of its national SIP call into a regional or local rule by implementing it in one state at a time.[11] Neither should it countenance blatant forum shopping where EPA seeks to evade centralized review of its national policy—and binding Circuit precedent (*i.e.*, the *NRDC* decision) which makes clear that national policy is unlawful—by exempting a single state and directing review of the agency's new interpretation to a different forum.

Even if the Court concludes that EPA's SIP Call withdrawal for Texas is not nationally applicable (it is), this Court is still the proper venue for this case under 42 U.S.C. § 7607(b)(1) because EPA arbitrarily refused to make and publish a finding that the new rule is "based on a determination of nationwide scope or effect." For the same reasons the Withdrawal Rule is nationally applicable, it is also based on a determination of nationwide scope and effect. Further, EPA has "consistently described" the SIP Call's prohibition on affirmative defenses as

[11] It is well established that the Court is not bound by an administrative agency's classification of its own action. Indeed, "bureaucratic boilerplate often obscures the [agency's] true purpose," and therefore the "agency's own label" is not dispositive. Instead, "it is the substance of what the (agency) has purported to do and has done which is decisive." *See Chamber of Commerce v. Occupational Safety and Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) (quoting *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942)).

being based on determinations of nationwide scope and effect.[12] Thus, any action "withdrawing" or "deviat[ing] from" that national prohibition is, by definition, also based on a determination of nationwide scope and effect. 85 Fed. Reg. at 7,239.

To give effect to Congress' clear intent that this Court review regulatory issues of national importance, this Court must have authority to review in the first instance EPA's failure to make a finding of nationwide scope and effect. *See Nat'l Envtl. Dev't*, 891 F.3d at 1053 (Silberman, J., concurring) (EPA's failure to make a finding of nationwide scope and effect "does not escape review under the APA's arbitrary and capricious standard"); *Texas v. EPA*, 829 F.3d 405, 419-20 (5th Cir. 2016) (reviewing *de novo* EPA's venue determination).[13]

EPA's refusal to find that this Court is the appropriate venue for review of the Withdrawal Rule is also arbitrarily inconsistent with the agency's findings regarding the SIP Call. EPA has "consistently" maintained—and the Fifth Circuit correctly agreed—that all challenges to the SIP Call's national affirmative defense policy should be reviewed in this Court, in part because the SIP Call was based on a determination of nationwide scope and effect. *See* Order Transferring Case, No.

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[12] EPA Resp. in Opp. to Mot. to Sever at 6, No. 15-1239, ECF No. 1576172 (citing 78 Fed. Reg. at 12,540 (Proposal); 79 Fed. Reg. at 55,955-56 (Supplemental Proposal); 80 Fed. Reg. at 33,883 (Final)).

[13] The Clean Air Act's venue provision is not jurisdictional, but instead simply divides venue among the courts of appeal. *Dalton Trucking, Inc. v. EPA,* 808 F.3d 875, 878-80 (D.C. Cir. 2015). Thus, this Court has authority to determine whether EPA's venue determination was arbitrary.

15-60424, ECF No. 00513174477.[14] Indeed, that policy is explicitly "based on" a uniform interpretation of the requirements of the Clean Air Act—namely, that state plans cannot include affirmative defenses for emissions during startup, shutdown and malfunction events—which "apply to SIP provisions for all states across the nation." *See* 79 Fed. Reg. at 55,955-56 (Supplemental Proposal); 80 Fed. Reg. at 33,883 (Final). EPA further recognized that a "key purpose" of the Clean Air Act's venue provision is to "minimize instances where the same legal and policy basis for decisions may be challenged in multiple courts of appeals, which instances would potentially lead to inconsistent judicial holdings and a patchwork application of the [Clean Air Act] across the country." *Id.* at 33,883. EPA had it right the first time, and has failed to offer a reasonable explanation for why it is changing position. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) ("the agency must show that there are good reasons for the new policy.").

II. THIS CASE SHOULD BE CONSOLIDATED WITH THE CHALLENGES TO THE SIP CALL AND HELD IN ABEYANCE.

This Court should consolidate this case with the existing challenges to the SIP Call because doing so will "achieve the most efficient use of the Court's resources" and "maintain consistency in [the Court's] decisions." *See* D.C. Cir. Handbook Part V.A. To conserve judicial resources and avoid potentially

[14] *See also* EPA Mot. to Dismiss at 11, 15, No. 15-60424, ECF No. 00513120190 (arguing that "agency actions implicating questions of national importance," like the SIP Call, should be heard in this Court).

conflicting decisions regarding the legality of affirmative defense and other legal issues underlying the SIP Call, the Court should also continue to hold all of the consolidated cases (including this one) in abeyance until EPA takes formal action regarding the SIP Call as a whole.

The legal issues in this case and in the SIP Call challenges are virtually identical. In fact, most (or all) of the issues that Petitioners intend to raise have been briefed extensively in the challenges to the SIP Call. *See* D.C. Cir. Handbook Part V.A. ("cases involving essentially the same parties or the same, similar, or related issues, may be consolidated.").[15] In the SIP Call and its briefs in the still-pending consolidated cases, EPA itself, relying on *NRDC*, made the same core argument that Petitioners intend to present—that "the CAA [Clean Air Act] prohibits all affirmative defense provisions in SIPs … because [they] impinge[] on the jurisdiction of the federal courts." EPA Br. at 84, No. 15-1166 (D.C. Cir. Oct. 28, 2016), ECF No. 1643446; 80 Fed. Reg. at 33,852 (citing *NRDC*, which "indicated that there could be no valid legal basis for such a provision [an affirmative defense] because it contradicted fundamental requirements of the CAA

[15] Although the various Texas petitioners have filed substantially identical motions to dismiss their petitions, the still-pending state and industry challenges to EPA's affirmative defense policy raised the same core legal argument as the Texas petitioners—that the Fifth Circuit's *Luminant* decision precluded EPA's SIP Call. *See, e.g.,* State Pet'rs Br. at 35-36, No. 15-1166 (D.C. Cir. Oct. 31, 2016), ECF No. 1643502; *id.,* Texas Pet'rs Br. at 1-2, 6-9, 12, ECF No. 1643769; *id.,* Industry Pet'rs Br. at 56, 58, ECF No. 1643571.

[Clean Air Act] concerning the jurisdiction of courts in judicial enforcement of CAA requirements").

In the Texas Withdrawal Rule, EPA's primary basis for reversing the SIP Call to Texas is identical to the argument that many state and industry petitioners made in their challenges to the SIP Call—*i.e.*, that the Fifth Circuit's *Luminant* decision upholding EPA's prior approval of the Texas affirmative defense warrants differing treatment of the Texas affirmative defense. *E.g.*, 85 Fed. Reg. at 7,236 ("in light of the *Luminant* decision, the appropriate policy is to consider the Texas affirmative defense provisions to be consistent with CAA [Clean Air Act] requirements"); Texas Pet'rs Br. at 1, No. 15-1166, ECF No. 1643769 (arguing SIP Call is "precluded by the Fifth Circuit's holding in *Luminant*").[16] The other (non-Texas) industry and state petitioners also relied heavily on *Luminant* to argue that affirmative defenses are lawful. *See, e.g.*, Industry Pet'rs Br. at 59, No. 15-1166, ECF No. 1643571 ("*Luminant*, contradicts EPA's latest interpretation of CAA [Clean Air Act] requirements point-by-point."); State Pet'rs Br. at 36, No. 15-1166, ECF No. 1643502 ("*NRDC* did not address whether SIPs could contain such

[16] As EPA consistently maintained in the SIP Call and related litigation, *Luminant* held only that EPA's previous interpretation allowing limited affirmative defense provisions in state plans was a reasonable interpretation of ambiguity in the Act under *Chevron* step two, 714 F.3d at 852, and the holding did not preclude the opposite interpretation—that affirmative defenses are inconsistent with the Act. 80 Fed. Reg. at 33,856; EPA Br. at 101, No. 15-1166, ECF No. 1643446; EPA Mot. to Dismiss at 10, No. 15-60424, ECF No. 00513120190; EPA Resp. in Opp. to Mot. to Sever, No. 15-1166, ECF No. 1576172.

affirmative defenses, and the case explicitly acknowledged the Fifth Circuit's holding in *Luminant* that it was permissible for States to include affirmative defenses in SIPs.") (citing *NRDC*, 749 F.3d at 1064 n.2).

Because the legal issues in this case and the challenges to the SIP Call are virtually identical, consolidating all of the cases together would further judicial economy and the consistency of this Court's decisions—especially if all of these cases are held in abeyance until EPA formally announces how it will proceed with the SIP Call as a whole. Even if the Court were to decide that consolidation is not proper, judicial economy and consistency of decisions would be furthered if the panel that has already been assigned to the SIP Call challenges takes this new case. *See* D.C. Cir. Handbook Part X.E.2. ("If the panel [assigned to an earlier case] determines, in the interest of judicial economy and consistency of decisions, to take the new [related] case, it will so advise the Clerk.").

DATED: April 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 27(d)(2)(A), the foregoing **Motion to Confirm Venue, Consolidate, and Hold in Abeyance** contains 4,612 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore complies with the 5,200-word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

DATED: April 21, 2020

/s/Andrea Issod
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SIERRA CLUB

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 27(a)(4), Petitioners Sierra Club, Air Alliance Houston, Citizens for Environmental Justice, Community In-Power and Development Association, Downwinders at Risk, Environmental Integrity Project, Natural Resources Defense Council, Public Citizen, and Texas Campaign for the Environment submit this certificate as to parties, rulings, and related cases.

(A) Parties and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to this Case

Petitioners

Petitioners in Case No. 20-1115 are Sierra Club, Air Alliance Houston, Citizens for Environmental Justice, Community In-Power and Development Association, Downwinders at Risk, Environmental Integrity Project, Natural Resources Defense Council, Public Citizen, and Texas Campaign for the Environment.

Respondents

Respondents in this case are the United States Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as Administrator of the EPA.

Intervenors

None at present.

(iii) *Amici* in this Case

None at present.

(iv) Circuit Rule 26.1 Disclosures

See Petitioners' disclosure statement filed with the Petition for Review.

(B) Rulings Under Review

Petitioners seek review of the final action of EPA entitled *Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision—Affirmative Defense Provisions*, which was published in the Federal Register at 85 Fed. Reg. 7,232 on February 7, 2020.

(C) Related Cases

This case is related to *Environmental Committee of the Florida Electric Power Coordinating Group v. EPA*, Case No. 15-1239 (and consolidated cases).

DATED: April 21, 2020

/s/Andrea Issod
Andrea Issod
SIERRA CLUB

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2020, the foregoing **Motion to Confirm Venue, Consolidate, and Hold in Abeyance**, and Attachment thereto, were served electronically through the Court's CM/ECF system on all registered counsel.

/s/Andrea Issod
Andrea Issod
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